MOTION FILED
APR 15 1980

No. 79-1247

In the Supreme Court of the United States

OCTOBER TERM, 1979

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

MOTION OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

BRIEF OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DONALD P. COLLETON
JAMES L. FOX
WALTER N. VERNON III
Attorneys for Amici Curiae

Of Counsel:
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
312-644-8500

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Motion for Leave to file Briefs as Amici Curiae 1

Preliminary Statement 5

Nature and Interests of the Exchanges, Amici 6

Questions Presented For Review 10

Argument 11

I.

The Decision Of The Court Below Is At Odds With Standards Of Judicial Review Applicable To Federal Agencies As Established By This Court. The Exemption From Judicial Review For Agency Action Committed To Agency Discretion Does Not Apply To The Commission In This Case 11

II.

The Commission's Action Is Judicially Reviewable Because It Abridges Constitutional Rights 14

III.

The Commission's Action Is Judicially Reviewable Because Repugnant To The Commission's Statutory Authority 20

Conclusion 23

TABLE OF AUTHORITIES

PAGE

Board of Trade of the City of Chicago v. Commodity Futures Trading Commission, 605 F.2d 1018 (7th Cir. 1979) 12, 13, 21

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 11, 12

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 13

General Foods Corp. v. Brannan, 170 F.2d 220 (7th Cir. 1948) 13

Great Western Food Distributors v. Brannan, 201 F.2d 476 (7th Cir. 1953) 13

Leedom v. Kyne, 358 U.S. 184 (1958) 21

Peto v. Howell, 101 F.2d 353 (7th Cir. 1938) 13

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977) 13

U.S. v. Patten, 187 F. 664 (1911) 13

Valkart Bros. v. Freeman, 311 F.2d 52 (5th Cir. 1962) 13

STATUTE AND RULE

Section 701(a)(2) of the Administrative Procedure Act 18, 19

Section 704 of the Administrative Procedure Act 19

Section 5a(12) of the Commodity Exchange Act 12

Section 8a(9) of the Commodity Exchange Act 11, 13, 20

LEGISLATIVE HISTORY

Conf. R. No. 93,1383, p. 35-36 14

Conf. R. No. 93-1194, p. 35-36 14

S. Rep. No. 93-1131, 93d Cong., 2d Sess., p. 6 14

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

MOTION OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The named exchanges respectfully move, pursuant to Rule 42(3), for leave to file the attached brief *amici curiae* in support of the Petition for Write of Certiorari. Movants obtained the consent in writing of Petitioner to the filing of their brief but were refused consent by the Solicitor General because of the lateness of their request. Counsel respectfully advise the Court that the extreme activity in commodity futures markets in recent weeks has occasioned inordinate demands on their time and delayed preparation of their brief as *amici curiae*.

In support of their Motion for leave to file, movants state:

The three exchanges with the Chicago Mercantile Exchange (expected to file a separate brief amicus, and the Petitioner, Chicago Board of Trade, account for all of the futures trading in the grains and livestock in the United States and for over ninety-five percent of all trading in agricultural commodities. The pricing mechanisms of these futures exchanges form a basis for pricing sales in both the domestic and export markets of substantially all wheat, corn, oats and the soybean complex. Sales of these commodities are in the tens of billions of dollars annually.

Futures trading on each of the four exchanges is inextricably related to that on the Chicago Board of Trade through intermarket spreading, hedging and arbitrage transactions. The action of the Commodity Futures Trading Commission forming the subject of the Petition for Writ would directly have affected the four moving exchanges. The dollar volume of futures trading in agricultural commodities on the four exchanges exceeds a hundred billion dollars annually.

Although not directly affected by the challenged order of the Commission, all of the exchanges were affected by its order of March 15, 1979 which stopped trading in March wheat on March 16th on the Chicago Board of Trade. Three of the moving exchanges trade contracts in March wheat and the effect on them of the closing of the principal market at the Chicago Board of Trade was direct and substantial.

Movants believe that the Petition fails adequately to develop the awesome import of the Commission's order, the constitutional abridgements which inhere in it, its arbitrary and capricious character, the repugnancies between it and the express mandates of the Act, and its harmful effects on the trade and members of the trading public,

especially smaller and less well capitalized traders who most often suffer severe financial losses as a result of an untoward market condition such as the Commission would have imposed.

These aspects of the order are developed in amici's brief and provide compelling warrant for granting the writ and, should the writ be granted, important perspective in the construction of a new (1974) statutory provision not heretofore subject to this Court's scrutiny.

For the foregoing reasons, but principally because of the extreme importance of the futures markets to the well being of the national economy in these critical days of turmoil in both domestic and international commodity markets, we believe all relevant arguments should be heard by the Court, now called upon to decide whether to hear an issue directly affecting markets which dwarf the securities industry in their dollar volume and which act to determine the price of the daily sustenance of almost every human being on earth.

Respectfully moved,

MID AMERICA COMMODITY EXCHANGE,
BOARD OF TRADE OF KANSAS CITY,
MISSOURI AND MINNEAPOLIS GRAIN
EXCHANGE

By .....
JAMES L. FOX
One of their Counsel.

Of Counsel:
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
312-644-8500

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,
Petitioner,

vs.

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

BRIEF OF MID AMERICA COMMODITY EXCHANGE, BOARD OF TRADE OF KANSAS CITY, MISSOURI AND MINNEAPOLIS GRAIN EXCHANGE, AS AMICI CURIAE, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

A Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was filed on February 12, 1980, by the Board of Trade of the City of Chicago (Board of Trade). It seeks review and reversal of the decision in *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Commission*, Appeal No. 79-1278, 605 F.2d 1018 (7th Cir. September 12, 1979), in which the Court of Appeals held that the Commodity Futures Trading Commission's (Commission) determination

that a market "emergency" exists is exempt from judicial review.

The MidAmerica Commodity Exchange, Kansas City Board of Trade and Minneapolis Grain Exchange, in accordance with their Motion filed contemporaneously herewith, have sought leave to file their appearances as amici curiae to urge that the Petition of the Board of Trade be granted and to submit, in accordance with the Rules, a brief on the merits urging reversal of the decision of the Court of Appeals.

The named exchanges, as amici, urge that the Petition of the Board of Trade be granted because the Court of Appeals decided an important question of federal law which has not been and should be decided by this Court—viz., whether a determination by the Commission pursuant to Section 8a(9) of the Commodity Exchange Act (Act), 7 U.S.C. Section 12a(9), that an "emergency" exists and the action it takes as a consequence of that determination are subject to judicial review.

NATURE AND INTERESTS OF THE EXCHANGES, AMICI

The Chicago Mercantile Exchange (CME), which is expected to file a separate brief amicus, is the world's second largest commodities futures market. It conducts futures trading in agricultural products, metals, currencies and debt instruments. In 1979, trading volume was 20 million contracts valued at hundreds of billions of dollars. With the Chicago Board of Trade and the Chicago Mercantile Exchange, the MidAmerica Commodity Exchange, the Kansas City Board of Trade and the Minneapolis Grain Exchange account for all futures trading in the United States in the grains, livestock and in the soybean com-

plex.[1] Such trading represents over 95% of all futures trading in domestic agricultural products.[2]

The emergency action of the Commission which is the subject of the Petition for Writ of Certiorari was not directed at trading on the Chicago Mercantile Exchange; however, it directly affected those of its traders and members of the industry and of the public generally who held intermarket spreads or hedges in grains and livestock. For example, certain cattle and hog feeders regularly take intermarket spreads or hedge posititons in the feed grains and soybean complex and in either live cattle or hogs in order to protect against fluctuations in the costs of feed and in the price received in the cash market on sale of the animals at the end of the feeding period. That portion of the transaction relating to cattle or hogs would be effected on the Chicago Mercantile Exchange while the portion relating to grain would be placed on the Board of Trade. When a part of, i.e., one "leg" of a hedger's transaction continues to fluctuate in accordance with market forces, i.e., the cattle or hog price, whereas the grain leg is fixed at a price level set by the Commission, the hedger is placed in an exposed position so that prices he pays or receives are, as to a part of his spread, determined not by supply and demand but by governmental fiat and he is thus placed at risk by the Commission's action.[3]

---

[1] The soybean complex includes soybeans, soya meal and soybean oil.

[2] The only domestic agricultural products not traded on the five exchanges are cotton and orange juice concentrate.

[3] Wheat not usually being considered a feed grain, the case at bar, involving March wheat, is atypical to the example. However, an example did occur when following the March wheat incident and the decision of the Court of Appeals, the Commodity Futures Trading Commission in January, 1980, again invoking its alleged "emergency" powers under Section 8a(9) of the Act, halted futures trading in all grains and the soybean complex for two days while permitting livestock and other futures to continue trading.

The MidAmerica Commodity Exchange, Kansas City Board of Trade and Minneapolis Grain Exchange were not subject to the Order directed to the Chicago Board of Trade but all have contracts in March wheat and the cessation of trading in the March contract on the Chicago Board of Trade on March 15 had a direct effect on the volume of wheat traded on these exchanges on that day and on the ability of their markets accurately to reflect the forces of supply and demand on the price of their March wheat contracts.[4] Spreading transactions in wheat between Kansas City and Chicago, particularly among commercial users of the market, occur in substantial volume and between Minneapolis and Chicago to a lesser degree. The order of the Commission which stopped trading in the Chicago March contract, i.e., on one leg of the spread, had a disruptive effect on the March contracts on the other exchanges, deprived traders on the latter exchanges of the ability to remove or roll over to another contract month their Chicago legs and, since Chicago was frozen at a price as of the close of the market on the day preceding the stopping of trading, occasioned losses or profits in the spreads unrelated to *market forces which were operating in wheat notwithstanding the cessation of trading in Chicago.*

The interests of the amici exchanges are not limited to the particular case decided by the Court of Appeals. The case has far reaching implications for an industry which annually trades futures contracts having a value of a trillion dollars and which more perhaps than any other form of mercantile trading depends upon the integrity of

[4] The MidAmerica Commodity Exchange market in March wheat is derivative to that on the CBOT and its directors suspended trading in the March contract when trading was suspended at the CBOT.

the contracts being traded and their terms, inexorably fixed by exchange rules based on almost a century and a half of trade practice and experience, terms, moreover, approved by the Commission.

The alleged abuse by the Commission of its "emergency" power and the non-reviewable status given the action of the Commission by the decision of the Seventh Circuit without exaggeration constitute the gravest threat to the integrity of the futures markets since their inception. The decision paves the way to continuing abuse of that power, subject to review by no court notwithstanding that every use of that power, perforce, must deprive traders of contract rights long held inviolable. Those persons who use the futures markets for price determination purposes, and substantially all of the tens of billions of dollars of grain sold in commercial channels both domestically and for export is sold at prices based on prices of futures contracts traded on the named exchanges, must be assured that those prices reflect supply and demand, and not what the government thinks the price ought to be.[5] So must

[5] Notably the Commission's Order of March 16 set a price of $3.76-¾ per bushel as the price at which all March contracts were to be settled. Petitioner's App. 30A. This price was the *market's* settlement price at the close on March 15th. If this price did not reflect supply and demand *at that time,* it seems hard to believe the government would order contracts for some ten million bushels of March wheat to be settled at such price! Conversely, that price could not reflect the free market price for wheat on March 19, 20 and 21, the three remaining trading days of the contract on which the order would have stopped trading. It is a known fact that as the trading draws to a close the differential between cash and futures prices narrows to a figure representing the cost of delivery, i.e., inspection, grading, etc. The Order would have interfered with this normal occurrence.

the farmers and other producers, the feed mills and processors who use the futures markets to hedge their production have assurance that the markets will function regularly, that they may hedge and lift and move hedges in markets free of improper governmental interference with the continued functioning of these markets according to their contract terms.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the exemption from judicial review created under Section 701(a)(2) of the Administrative Procedure Act for Agency Action committed to agency discretion applies to emergency determinations of the Commission under Section 8a(9) of the Act.

2. Whether the Commission's action is judicially reviewable because it abridges constitutional rights.

3. Whether the Commission's action is judicially reviewable because repugnant to the Commission's statutory authority.

ARGUMENT

I

THE DECISION OF THE COURT BELOW IS AT ODDS WITH STANDARDS OF JUDICIAL REVIEW APPLICABLE TO FEDERAL AGENCIES AS ESTABLISHED BY THIS COURT. THE EXEMPTION FROM JUDICIAL REVIEW FOR AGENCY ACTION COMMMITTED TO AGENCY DISCRETION DOES NOT APPLY TO THE COMMISSION IN THIS CASE.

Amici adopt petitioner's argument on this, its first point, and would expand upon its argument that Section 8a(9) of the Commodity Exchange Act, at issue here, is not "drawn in such broad terms" that in the case at bar "there is no law to apply" and hence no judicial review is permissible. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971).

It is unquestioned that the definition of an "emergency" in Section 8a(9) of the Act is limited in scope and that such limitation is given emphasis. First the term is specifically limited by definition:

> "The term 'emergency' as used herein shall mean, in addition to threatened or actual market manipulations and corners, any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity. * * *"

Its narrow parameters are then brought into sharp relief by establishing them as a subset of the multi and varied circumstances, peculiarly within the ken and competence of the several exchanges, which occur during trading and

which may endanger the stability or integrity of a market and hence require exchange emergency action:

> "Provided, that nothing herein shall be deemed to limit the meaning or interpretation given by a contract market to the terms 'market emergency', 'emergency', or equivalent language in its own bylaws, rules, regulations or resolutions. [As added by Act of October 23, 1974 (Commodity Futures Trading Commission Act of 1974), effective April 21, 1975, Sec. 215, 88 Stat. 1040.]"[6]

The portion of the statute first quoted defining "emergency" is "a plain and explicit bar", *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 411 to the exercise of the Commission's "emergency" power except in the limited circumstances delineated within the definition and thus is to be distinguished from the latter portion's eschewal of any limitation of the circumstances under which the several exchanges may take emergency action.[7]

With such a definition of the term "emergency", "(p)lainly there is 'law to apply' and thus the exemption (from judicial review) for action 'committed to agency discretion' is inapplicable." *Citizens to Preserve Overton Park* v. *Volpe, supra,* 401 U.S. at 413.[8] However, the

[6] Congress specifically delegated authority to the exchanges to take emergency action. Cf. Section 5a(12) of the Act.

[7] It bears noting that Congress' grant of "emergency" power to the Commission over futures markets can be exercised by the Commission only through the agency of the exchanges, further amplifying the concept of *exchange* regulation of trading implicit in the congressional debates on the 1974 amendments.

[8] It thus escapes us how the Court of Appeals, acknowledging the narrow definition of emergency, *Board of Trade* v. *Commodity Futures Trading Commission,* 605 F.2d 1016, 1022, could fail to find a "law to apply" and thus render inapplicable the exemption created for action "committed to agency discretion." *Overton, supra,* at 413.

Court of Appeals, faced with the law enunciated by this Court in *Overton* and the strict definition of emergency in 8a(9) had to and did cast about for some other term in the statute stated, at least facially, so broadly as to afford it a loophole to bring the case within the exception. It fastened, and we argue, erroneously, upon the terms "maniupulations" and "corners" and "a market disturbance which prevents the market from accurately reflecting the forces of supply and demand." *Board of Trade* v. *Commodity Futures Trading Commission,* 605 F.2d 1016, 1022, n. 8.

Amici submit that if there are any terms of art that are well known, defined and peculiarly indigenous to commodity trading, they are "corners" and "manipulations". Nor are definitions of these terms solely within the province of the industry. Frequent interpretations are found in the cases. Cf. *United States* v. *Patten,* 187 F. 664, 668 (1911); *Peto* v. *Howell,* 101 F.2d 353, 357 (7th Cir. 1938); *Great Western Food Distributors* v. *Brannan,* 201 F.2d 476, 478 (7th Cir. 1953); *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 (1977); *Ernst and Ernst* v. *Hochfelder,* 425 U.S. 185 (1976); *Valkart Bros.* v. *Freeman,* 311 F.2d 52, 58 (5th Cir. 1962); *General Foods Corp.* v. *Brannan,* 170 F.2d 220, 231 (7th Cir. 1948). Nor is the term "market disturbance" vested with some peculiar, arcane connotation known only to the Commission; rather the reported cases construing corners and manipulations are replete with examples of so-called market disturbances. As the trial judge remarked:

> "Now an emergency is not just your mine run ordinary fact. An emergency is something that is dramatic and obvious, ordinarily obvious, critical about which reasonable people ordinarily would not disagree. * * * I'm not called upon to judge some arcane question of commodities trading. * * * Rather, what

> I am called upon to assess a garden variety factual question. * * *'' Petitioner's App. A23.

Accordingly, it is submitted that the reasoning employed and relied upon by the court below and recited in its footnote 8 is incorrect; and, in view of the precision found in the drafting of the statute, appears at best as an attempt to secure an end result, for whatever reason, by treating industry terms of art as amorphous in connotation or as so esoteric as to escape that intelligence common to the futures industry and the bench. The ''emergency'' action of the Commission is therefore subject to judicial review and the decision below should be reviewed and reversed, and the unbridled authority[9] it affords the agency to interpose its judgment in markets of worldwide significance thus subjected to the restraints and safeguards only the judiciary can provide.

II.

THE COMMISSION'S ACTION IS JUDICIALLY REVIEWABLE BECAUSE IT ABRIDGES CONSTITUTIONAL RIGHTS.

It cannot be disputed that the action which the Commission directed the exchange to take pursuant to Section

---

[9] Also countering the Commission's present claim of unbridled, unreviewable authority in emergency matters is the language in Section 2(a) of the Act which provides: "Nothing in this section shall supercede or limit the jurisdiction conferred on courts of the United States or any State." This provision, absent in the House bill, was added by the Senate to clarify that the jurisdiction of the courts, unlike that conferred on state agencies by inconsistent state laws which the Act pre-empts, was expressly retained. Conf.R. No. 93-1383, p. 35-36; Conf.R. No. 93-1194, p. 35-36; S.Rep. No. 93-1131, 93d Cong., 2d Sess., p. 6. This clear intent to preserve court jurisdiction is not otherwise qualified in the legislative history for circumstances requiring emergency Commission action.

8a(9) would have resulted in the taking of property, we submit, in derogation of traders' rights of due process. Specifically the Commission's order of March 16, 1979 provided that the Chicago Board of Trade shall:

> ''(1) immediately terminate all trading in the (March wheat) contract on March 19, 20 and 21, 1979, the three remaining trading days in the Contract;
>
> (2) permit deliveries of wheat to be made in fulfillment of current open positions in the Contract through the last day permitted for delivery under the rules of the Chicago Board of Trade at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979; and
>
> (c) settle all positions in the Contract remaining open as of the close of business on March 30, 1979, at the settlement price for the Contract in effect at the close of trading in the Contract on March 15, 1979.'' Petitioner's App. A30.

Part (1) of the Order would have abridged the rights of all of the longs and shorts in the March wheat option voluntarily to offset their contracts in the market on March 19, 20 and 21 rather than to stand for or make delivery. The value of the wheat represented by the open interest held by these longs and shorts approximately 30 million dollars. From the start of trading in the March 1979 contract in March of 1978 every trader knew that trading would continue until March 21, 1979. This was one of the terms of the contracts each bought or sold. At the close on March 15th all of the producers, processors, exporters, etc., as well as speculators who were still in the market, knew that they had four trading days left within which to offset their positions in the wheat pit at prices which varied from minute to minute and even more often

as price determining forces worked in the market. Obviously offsetting shorts expected to buy in their short positions during the last four trading days at prices below the settlement price on the 15th while hedgers expected to lift their hedges during these four days at prices which would also act as the pricing basis for sales of their hedged cash wheat in commercial channels. Had they not so expected, they would not have stayed short through the 15th. Similarly the market prior to the Commission's order had been freely trading. Speculative longs expected or hoped to sell out their positions at higher prices while long hedgers expected to lift their hedges at prevailing prices which also acted as the basis for their purchases in commercial channels. Other commercial longs expected to stand for delivery to use the delivered wheat for their commercial purposes.

By its order terminating trading on the 16th, Petitioner's App. A26, and the later enjoined order, the Commission assayed to interdict the foregoing rights, arbitrarily freeze the market at the settlement price of $3.76¾ on March 15th, and preclude the holders of contracts for 9 million bushels of wheat, the vast majority of whom had no relationship whatsoever with the small number of speculative traders noted in the Commission order, Petitioner's App. A26, from fulfilling their market expectations and purposes. Without notice, by terminating trading through its orders, the Commission would have forced *all* longs, including small speculators drawn from the general public, into the hapless position of being unable to offset their positions in the market on the last four days when most of them expected to be able to do so and thus being forced into a position of taking delivery of such wheat as the shorts delivered. It is appalling to consider what this might

have meant to a small speculator with two thousand dollars of his capital posted as margin on say two contracts of wheat and who is told by his broker that the Commission has terminated trading in the contract and that he must be prepared to accept delivery of 10,000 bushels of wheat at a cost of over $35,000. If delivery so occurred, the individual would be forced into cash grain channels to dispose of his wheat in a transaction that might cost him hundreds if not thousands of dollars in market variation let alone additional commission, storage, insurance and interest charges.

Such an outstanding state of affairs have been foisted upon every long in the market had the order of the Commission not been set aside.

Nor was the mischief confined to part (1) of the order. Parts (2) and (3) permitted shorts, normally the commercials, to enjoy the best of all possible worlds, in common parlance, to work both sides of the street from the 15th through the last day for delivery in the month, viz., March 29th. Holding the cash article and being assured of a price frozen by the Commission at $3.76¾, shorts could await expected higher prices in the cash market during the two week period. If such developed, they would sell their wheat at the higher cash price and have their futures contract settled at the $3.76¾ figure set by the Commission (Part (3) of the order). If, conversely, the cash price declined, they would deliver their wheat on their short contracts at $3.76¾ and, on the way to the bank, laugh at hapless longs forced into taking delivery, longs who had been denied their right and ability to offset their long positions in the pit because of the early termination of trading required by Part (1) of the Commission's order.

In sum, the Commission's order would have deprived all traders desiring to do so of their rights under their contracts to offset for the three trading days of the 19th, 20th and 21st. It also would have conferred special favor and benefit on the shorts while imposing an enormous burden on those longs who, never wanting or even able to accept delivery, would have had it foisted upon them. Meanwhile, the contracts rights of longs who expected to stand for delivery for commercial or trading purposes would have been taken by permitting shorts to default with impunity and settle their contracts at the price arbitrarily set by the Commission's fiat.[10]

In our American system, government cannot take property without an opportunity for a hearing and so the petitioner is entirely correct in arguing that the emergency order denies to its members and the general public who use its markets the constitutional rights of due process because the taking it occasions is at no point subject to judicial scrutiny.

Significantly, the right to judicial review of this constitutional concern is not affected by the niceties of Section 701(a)(2). For one thing, the provisions of this section

[10] The arbitrary, capricious and constitutionally defective character of the Commission's order is brought into sharp contrast by the Board of Trade's order, 605 F.2d 1019, n. 2, whereunder trading continued for the contract period "for liquidation only". Thereby, traders who wished to offset and those who wished to stand for or make delivery could do so, all at prices set by the free market. The exchange's order abridged no one's right. Its only prohibition was directed against the taking of new positions in the market except for shorts with grain in deliverable position. That the Commission knew of the exchange's Order when its challenged Order of March 16th was issued compounds the arbitrary and capricious character of the latter and heightens the need for judicial review.

do not bar judicial review when, as here, the challenge is on constitutional grounds, 605 F.2d at 1021, n. 6.[11] Moreover, the taking complained of here does not result so much from the Commission's determination of the existence of an emergency as it does from the substance of the order fashioned by the Commission in the face of that determination. It is only the former—"the merits of the Court's emergency determination", 605 F.2d at 1025—which the Seventh Circuit found unreviewable. The substance of the action which the Commission required the exchange to take is a matter quite separate from the "emergency" determination and none of the appellate court's analyses of the history, structure and purpose of the Act suggests either that courts are unsuited to review the substance of such orders or that the Congress intended to preclude such review.[12] Indeed, it would be anomalous were the legislature to have shielded Commission remedies from judicial examination when historically the remedial actions, emergency or otherwise, of virtually every other federal agency are subject to judicial review. Certainly this is so when they result in the taking of property.

Consideration of the constitutional question presented here is especially important in that the Commission's

[11] Even if this exception to Section 701(a)(2) were not established, judicial review would still lie under Section 704 of the APA which allows judicial review when "there is no other adequate remedy in a court." Clearly, if the review argued for here is precluded, no judicial remedy is otherwise available to petitioner.

[12] The Court of Appeals could thus have affirmed the trial court's disposition of the case on the grounds that the Commission's *remedy* abridged constitutional rights notwithstanding its holding that review of the Commission's emergency determination—i.e., "reason to believe"—was foreclosed.

emergency powers affect hundreds of billions of dollars in property interests but have not yet been construed by this Court. Commodity markets are more active than ever before and their continued vitality is of international importance. The prospect of recurring controversy between the exchanges and the Commission over the exercise of emergency powers and the clash between that exercise and constitutional rights is high. Construction of the Act against the constitutional framework by this Court now will minimize the likelihood of controversy and facilitate proper operation of these markets.

III.

THE COMMISSION'S ACTION IS JUDICIALLY REVIEWABLE BECAUSE REPUGNANT TO THE COMMISSION'S STATUTORY AUTHORITY.

The Congress has given recognition to the national public interest served by the commodity futures markets, Act, Section 3, and the importance of their price determinative and hedging functions. By granting "emergency" powers to the Commission, Section 8a(9), the Congress charged it with the duty to "maintain or restore orderly trading in, or liquidation of" futures contracts. In Section 15, the Commission is required "to take the least anticompetitive means of achieving the objectives of (the) Act, as well as the policies and purposes of (the) Act in issuing any order * * *."

Action which substantially conflicts with these statutory mandates would be repugnant to the Commission's authority, and would be subject to judicial review notwithstanding any otherwise putative non-reviewability by

virtue of Section 701(a)(2) of the APA. See *Leedom* v. *Kyne,* 358 U.S. 184, 188 (1958); *Board of Trade* v. *CFTC, supra,* 605 F.2d at 1021, n. 6.

As noted in the argument to our preceding point, the substance of the challenged order, as distinguished from the Commission's emergency determination, would not only not have maintained or restored orderly trading in the contract but would have completely disrupted the market in March wheat by terminating trading. It thus would have destroyed the price determining function of that market in the crucial so called "nearby" or delivery month, a market which more than any other governs trading in cash wheat throughout the country as well as in the export trade. It would have thwarted the purposes of the Act, as we explained, by preventing the markets use by legitimate hedgers with the cash article in deliverable position who wished to hedge in the last days of the contract. It actually would have "fixed prices", i.e., at the arbitrary level of $3.67¾, rather than permitting prices to be set by competition in the pits. Further restraining competition and trade it removed the onus of making delivery from the shorts and conferred upon them a special competitive advantage. Also, as we noted, it forced all longs into a position of being obligated to accept delivery if such met the whim and fancy of the shorts.

Had the Commission purposely set out to violate the intent, purpose and policies of the Act it could not have done so more blatantly than it did by its order of March 16th. Happily for the trade, the public at large and the purposes of the Act, the Order was enjoined by the district court. And again we state that this Commission order,

repugnant in the extreme to its statutory authority and manifestely so to any person with commodity trading expertise, was issued with the Board of Trade's order in hand—an order which patently furthered the purposes of the Act in that: it maintained a price determining free market, available for hedging; promoted orderly trading in and liquidation of the contract, the latter by allowing trading for liquidation only and keeping the market open for the three days thus allowing offsetting of trades;[13] required shorts who did not elect to offset to fulfill the delivery requirements of their contracts; guaranteed the integrity of the contracts of longs who stood for delivery; and fixed no price.

Amici thus submit that the Court of Appeals should have looked beyond its formalistic approach to the Commission's "emergency" determination. It could have affirmed the district court's injunction against the statutorily repugnant order of the Commission, and should have done so in view of the overriding importance of the case and the need to decide the law governing this extraordinary provision of a new statute vitally affecting the national and international economy.

---

[13] The substantial majority of all futures trades are closed out by offset, less than 5% of the open interest, on average, being closed out by delivery.

CONCLUSION

For the reasons set forth, the MidAmerica Commodity Exchange, Board of Trade of Kansas City, Missouri and the Minneapolis Grain Exchange respectfully submit that the requested writ be granted.

Respectfully submitted,

DONALD P. COLLETON
JAMES L. FOX
WALTER N. VERNON III

Attorneys for the amici curiae

Of Counsel:
ABRAMSON & FOX
One East Wacker Drive
Chicago, Illinois 60601
(312) 644-8500